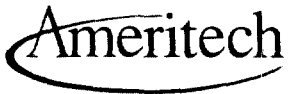


1401 H Street, N.W.
Suite 1020
Washington, D.C. 20005
Office 202-326-3817

CC Docket #96-98
CCB/CPD 97-30

EX PARTE FILING



Gary L. Phillips
Director of Legal Affairs
Washington Office

July 24, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: **Ex Parte Filing**
Docket CCB/CPD 97-30

Dear Ms. Salas:

The attached letter was sent to Christopher Wright, General Counsel, from John Lenahan, Assistant General Counsel for Ameritech and should be put in the record of the above referenced proceeding.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gary L. Phillips".

Attachment

cc: Kathryn Brown
Tamara Preiss

2

30 South Wacker Drive
Floor 39
Chicago, IL 60606
Office 312/750-5367
Fax 312/609-6307



John T. Lenahan
Assistant General Counsel

VIA FACSIMILE AND OVERNIGHT MAIL

July 23, 1998

Christopher Wright
General Counsel
Federal Communications Commission
1919 M Street
Washington, D.C. 20554

Re: *Illinois Bell v. WorldCom Technologies*
Case No.98C1925, U.S.D.C. of Illinois
and CCB/CPD 97-30

Dear Chris:

This is a follow-up to the conversation we had this morning. As I mentioned, Ameritech had consistently argued that the Commission has the exclusive or primary jurisdiction to determine the jurisdictional nature of calls made to the Internet. In that regard, I am attaching for your review excerpts from the above-referenced Illinois ISP complaint proceedings, both before the Illinois Commerce Commission and in the U.S. District Court. As you can see, we took the position that the FCC has exclusive jurisdiction to determine whether calls to the Internet should be classified as interstate traffic. We also argued that the FCC has repeatedly recognized that Internet calls are interstate, access calls.

As such, there is no need to determine whether the Commission has authority to issue regulations under Section 251(b)(5) of the 1996 Act, which addresses reciprocal compensation for local telecommunications services. At issue in the Eighth Circuit was whether the Commission had authority to issue regulations regarding local intrastate telecommunications services unless express authority was provided for such regulations by the plain terms of Section 251. See Iowa Utilities Board v. FCC 120 F 3d 753 at 794 and note 10.

The Eighth Circuit Opinion in no way narrows the FCC's exclusive authority to regulate interstate traffic. Because access to the Internet is interstate traffic, the FCC's jurisdiction to determine that this is not local traffic for reciprocal compensation purposes

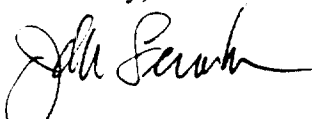
Christopher Wright
July 23, 1998
Page Two

is indisputable. Were it otherwise, a state would be able to impose reciprocal compensation obligations on any interstate traffic, and the FCC would be powerless to prevent it. That clearly is not the case; states may not lawfully regulate interstate commerce. Indeed, the only way the FCC could be found not to have jurisdiction to address this issue would be if a dial-up connection to the Internet was, in fact, local traffic. Only then would the Eighth Circuit's limits on the FCC's authority come into play. However, since 1983, the FCC has recognized that ISP traffic is interstate access traffic, not local traffic. That is why the FCC has repeatedly found it necessary to exempt Internet traffic from its Part 69 regime. Because this traffic is interstate access traffic, there can be no dispute regarding the FCC's jurisdiction to rule that it is not local traffic for reciprocal compensation purposes.

It is also noteworthy that the Eighth Circuit specifically did not vacate Rule 51.701 which limits the payment of reciprocal compensation to local telecommunications services. *See* 120 F3d at 819, note 39. Ameritech also believes that the Commission correctly concluded that as a matter of law "transport and termination of local traffic are different services than access service for long distance telecommunications." Likewise, the Commission correctly concluded that "the reciprocal compensation provisions of Section 251(b)(5) for transport and termination of traffic do not apply to the transport and termination of interstate or intrastate interexchange traffic." *See* First Report and Order CC Docket 96-98 at §§ 1033 and 1034.

Chris, hopefully this responds to your question regarding Ameritech's position regarding the Commission's authority and jurisdiction regarding this important issue.

Sincerely,



John T. Lenahan

:plj

Attachments

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PAGE 2

**BEFORE THE
ILLINOIS COMMERCE COMMISSION**

TELEPORT COMMUNICATIONS)		
GROUP INC.)		
)		
Complainant,)		
v.	)	No. 97-0404	
)		
AMERITECH ILLINOIS)		
)		
Respondent)		
)		
)		
WORLD COM TECHNOLOGIES, INC.,)		
successor in interest to MFS INTELENET)		
Complainant,)		
v.	)	No. 97-0519	Consol.
)		
ILLINOIS BELL TELEPHONE COMPANY)		
d/b/a AMERITECH ILLINOIS.)		
)		
Respondent)		
)		
)		
MCI TELECOMMUNICATIONS CORP. and)		
MCI METRO ACCESS TRANSMISSION)		
SERVICES, INC.,)		
Complainant,)		
v.	)	No. 97-0525	
)		
ILLINOIS BELL TELEPHONE COMPANY,)		
d/b/a AMERITECH ILLINOIS)		
Respondent)		
)		
Complaint as to Respondent's refusal to pay)		
reciprocal compensation to Complainant for local)		
traffic terminated by Complainant to its Internet)		
service provider customers.)		

INITIAL BRIEF OF AMERITECH ILLINOIS

LINCOLN V. JANUS
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225 West Randolph Street - HQ 27C.
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Received Dec 22 10:30AM (08:14) on RightFax4 line [2] for 'TLI'
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PAGE 11

decision in the ALTS Docket. The same parties that are now before this Commission have already appeared and commented in the ALTS Docket. The FCC is taking up the same issue that lies at the heart of this complaint proceeding: namely, whether the FCC's exemption for ISP calls somehow converts them from exchange access to local traffic. And the FCC has been asked to grant the same relief -- assessment and payment of reciprocal compensation on ISP calls -- that the Complainants seek from this Commission.

2. This Commission Must Yield To The Exclusive Jurisdiction Of The FCC.

Of all the arguments made and testimony given before this Commission, one issue must take precedence. The FCC has exclusive jurisdiction over interstate traffic to determine whether interstate calls to ISPs are exchange access traffic. If, as Ameritech Illinois contends, the FCC has already ruled that ISP calls are not local traffic but exchange access, that ruling is dispositive.⁹ The Supremacy Clause of the Constitution states "the Laws of the United States . . . shall be the Supreme Law of the Land." U.S. Const. Art. VI. "The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." City of New York v FCC, 486 US 57, 63 (1988) (upholding preemptive force of FCC regulations against conflicting state and local regulations). Accordingly, "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." Id. at 64; see also, Time Warner Cable v. Doyle, 66 F2d 867 (7th Cir 1994) (holding that FCC regulations preempted state administrative enforcement proceedings, and that the district court should therefore have granted summary judgment in favor of the party seeking to enjoin proceedings).

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PAGE 12

Neither Ameritech Illinois nor the Complainants dispute the FCC's jurisdiction to issue its prior ISP orders, or the preemptive effect of the FCC's rulings; rather, the dispute herein centers on the proper interpretation of the FCC's prior orders. Indeed, the testimony of the Complainants' witnesses is replete with references to the FCC's prior rulings, along with ultimately unpersuasive attempts at explaining why those rulings support the Complainants' position. Further, the ALTS, in its June 20, 1997 letter initiating the FCC proceeding, specifically acknowledged that its requested "clarification" that ISP calls must be treated as local calls "is plainly within the [FCC's] exclusive jurisdiction." (emphasis added). (Am. Ill. Ex. 3, p. 1).

The requested "clarification" must be resolved by the FCC before this Commission can proceed further, because if Ameritech Illinois' interpretation is right, there can be no basis on which the Commission could rule in favor of the Complainants. Because the threshold interpretational dispute falls within the "exclusive jurisdiction" of the FCC -- as acknowledged by the ALTS and therefore most of the Complainants to this proceeding -- this Commission must defer its own analysis and resolution of the parties' contractual dispute until the FCC acts.¹⁰

3. The Primary Jurisdiction Doctrine Also Requires That The Commission Await The FCC's Decision Before Proceeding Further.

The doctrine of primary jurisdiction applies where there is a "need for experience and expert knowledge" and where there is a "need for uniform administrative interpretation," and where parallel proceedings would "hamper the agency's performance of its regulatory duties."

⁹Footnote continued from previous page...

MCI's witness Dennis Alcaz has conceded that the FCC does not consider ISP traffic to be local. (MCI Ex. 2.0, p. 10).

¹⁰As described by Mr. Panfil, "the FCC should properly address what implications -- if any -- its ISP exemption policy has for reciprocal compensation obligations or any other inter-carrier arrangements." (Am. Ill. Ex. 1.0, pp. 13-14).

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PAGE 29

it proves to be technically feasible, it will take time to implement. In the interim, the Commission should adopt a compensation mechanism that is fair to both parties — or, in this situation, equally “unfair” to both parties, given the FCC's rulings.

III CONCLUSION

For the reasons set forth above, Ameritech Illinois respectfully requests that the Commission defer ruling until the FCC issues its decision in the ALTS Docket. If the Commission does issue a decision, then Ameritech Illinois respectfully requests that the Commission deny the relief sought by the Complainants, and otherwise issue an order consistent with Ameritech Illinois' recommendations in this Brief.

Respectfully submitted,

By: 

LINCOLN V. JANUS
LOUISE A. SUNDERLAND
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225 West Randolph Street - HQ 27C
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(312) 727-7566

BEFORE THE
ILLINOIS COMMERCE COMMISSION

TELEPORT COMMUNICATIONS)			
GROUP INC.)			
)			
Complainant,)			
v.	)	No. 97-0404		
)			
AMERITECH ILLINOIS)			
)			
Respondent)			
)			
WORLDCOM TECHNOLOGIES, INC.,)			
successor in interest to MFS INTELENET)			
Complainant,)			
v.	)	No. 97-0519	Consol.	
ILLINOIS BELL TELEPHONE COMPANY)			
d/b/a AMERITECH ILLINOIS,)			
Respondent)			
)			
MCI TELECOMMUNICATIONS CORP. and)			
MCI METRO ACCESS TRANSMISSION)			
SERVICES, INC.,)			
Complainant,)			
v.	)	No. 97-0525		
ILLINOIS BELL TELEPHONE COMPANY,)			
d/b/a AMERITECH ILLINOIS)			
Respondent)			
)			
Complaint as to Respondent's refusal to pay)			
reciprocal compensation to Complainant for local)			
traffic terminated by Complainant to its Internet)			
service provider customers.)			

REPLY BRIEF AND MOTION TO STRIKE
OF ILLINOIS BELL TELEPHONE COMPANY

Now comes Illinois Bell Telephone Company ("Ameritech Illinois" or "the Company") by its attorneys, and files its Reply Brief in the above captioned proceeding.

Even if the Commission were to ignore the jurisdictional arguments raised by Ameritech Illinois and the need to defer, the Complainants have not provided any persuasive reason to interpret the "Local Traffic" reciprocal compensation obligation in the interconnection agreements to somehow include Internet ISP traffic. Such traffic is undeniably interstate in nature. It undeniably terminates at web sites all over the world. And it has undeniably been viewed as exchange access traffic by the FCC. Under these circumstances, Ameritech Illinois respectfully submits that the Commission can only reasonably conclude that such traffic is not local and not subject to reciprocal compensation.

II. ARGUMENT

A. The Commission Should Reject Staff and CLEC Arguments Concerning the FCC's Lack of Jurisdiction and Authority.

As discussed extensively in Ameritech Illinois' Initial Brief, the Commission should (and must) defer this proceeding to the FCC's resolution of the underlying legal issue: whether Internet ISP calls that are exempt from exchange access charges payments to LECs should instead be subject to reciprocal compensation payments from LECs. (Am. Ill. Int. Br., pp. 5-14). Ameritech Illinois' deferral position is premised on the FCC's exclusive and primary jurisdiction over the underlying legal question and the fact that only the FCC is in a position to interpret authoritatively its prior exemption. Staff and the Complainants disagree with Ameritech Illinois' position and contend that the Commission should proceed immediately to resolve the complaints on their merits.

First, the parties variously argue that the FCC has no jurisdiction over the dispute underlying this proceeding and that the FCC's treatment of ISP traffic (under its exemption) is simply not controlling. (TCG Int. Br., p. 5; MCI Int. Br., p. 12). These parties' argument are

premised, inter alia, on the Eighth Circuit's pronouncement that state commissions have the primary authority to enforce interconnection agreements (TCG Int. Br., pp. 7-8; WorldCom Int. Br., pp. 20-22); Iowa Utilities Board v. FCC, 120 F.3d 753, 804 (8th Cir. 1997)).

Ameritech Illinois does not dispute the authority of the Commission to enforce interconnection agreements. But, that authority cannot be viewed in isolation. Here, the dispute hinges on the proper interpretation of the FCC's prior orders, to which the Complainants' testimony and briefs make copious references. Moreover, as discussed in Ameritech Illinois' Initial Brief, the Complainants, through their membership in the Association for Local Telecommunication Services ("ALTS"), have initiated a proceeding at the FCC to seek clarification of the FCC's exemption policy.¹ ("ALTS Docket") (See Am. Ill. Int. Br., p. 7). The ALTS request is premised on the FCC's "exclusive jurisdiction" over the underlying legal question raised by the Complainants in this proceeding. (Am. Ill. Cross Ex. 3). Accordingly, the Complainants, by their actions and words, recognize that there is an underlying legal question that only the FCC can resolve: the meaning of its access charge exemption for ISP traffic and whether reciprocal compensation should apply under such an exemption. This Commission cannot determine whether there is any additional obligation to enforce under the interconnection agreements with respect to reciprocal compensation until the FCC resolves this issue.

The contentions that the FCC simply lacks jurisdiction (made by TCG) or that the FCC's interpretations will not be controlling (made by MCI) are particularly fallacious. (TCG Int. Br., p. 5; MCI Int. Br., p. 12). TCG is an active party in the ALTS proceeding where it "supports ALTS' request for clarification" with the FCC. (Attachment 1, p.1). Since the FCC has authority to provide the requested clarification -- as TCG admits through its support of the petition in the

ALTS Docket - then the FCC also has jurisdiction over the underlying legal question in this docket. Indeed, it is beyond serious dispute that the clarification which the FCC provides will be determinative of how state commissions interpret the term "local traffic" for purposes of reciprocal compensation. Under these circumstances, the only reasonable course of action which the Commission can take is defer the current proceeding until the FCC has acted.

Some of the parties also cite the FCC's Access Reform Order for the proposition that the Commission, rather than the FCC, has authority to address the ISP traffic and the question of reciprocal compensation. (Staff Int. Br., p. 13; WorldCom Int. Br., p. 22). The FCC has stated.

ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs ... To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators.

Access Change Reform, C C Docket No 96-262, First Report and Order, ¶ 348 (May 16, 1997).

Contrary to the position of these parties, the FCC was not addressing the issue of reciprocal compensation paid by the LECs to CLECs; the FCC was addressing usage rate structures through which LECs attempt to recover their costs for "providing service to customers with high volumes of incoming calls..." As Mr. Pafil pointed out, those usage rate structures make Internet ISP traffic a losing proposition for Ameritech Illinois even without the obligation to pay reciprocal compensation. (Am. Ill Ex. 10, p. 45). However, as Staff has succinctly pointed out, the usage rate structure issue is outside the scope of this proceeding. (Staff Int. Br., p. 16). The above-quoted language, therefore, has no impact on this proceeding and the fact that the Commission should defer it until the FCC addresses (as requested by the Complainants) the intent of its exemption policy in the context of reciprocal compensation.

¹ TCG is not a member of ALTS, but TCG has affirmatively participated in the ALTS Docket. See Attachment A to this Reply Brief, consisting of TCG's comments in that proceeding (Administrative Notice Requested).

Finally, some parties appear to suggest that, under the exemption policy, the FCC could not possibly conclude that ISP traffic is exempt from access charge payments (to LECs) but not subject to reciprocal compensation (from LECs). (MCI Int. Br., pp. 13-14; see also WorldCom Int. Br., pp. 13-14). These parties argue that, under Sections 251(b)(5) and 251(g) of the federal Telecommunications Act, carriers must pay reciprocal compensation for any traffic not subject to access charges. This "if not one (access charges) then the other (reciprocal compensation)" argument finds no support in the FCC's First Report and Order in Docket 96-98, where the FCC delineated reciprocal compensation obligations under the Act. In that order, the FCC stated that:

We conclude that Section 251 (b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area... (emphasis supplied)

Further, the FCC found,

We find that the reciprocal compensation provisions of Section 251 (b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.

First Report and Order, CC Docket 96-98, ¶1034. These conclusions demonstrate that the starting point for any reciprocal compensation analysis must be begun with the question of whether local traffic is involved. If it is not, then no reciprocal compensation obligation attaches irrespective of how the traffic is treated under access charges. If there is a compensation "hole", as WorldCom contends, it was created by the FCC when it adopted its exemption policy -- not Ameritech Illinois in this docket. (WorldCom Int. Br., p. 14).

Accordingly, this proceeding is not a simple one of contract interpretation as Staff and the Complainants contend. Until the FCC definitively determines the nature of its access charge exemption (as requested by all the Complainants in the ALTS Docket) and whether it intends reciprocal compensation to apply to ISP traffic, this Commission does not have the guidance

necessary to interpret and enforce the interconnection agreements with respect to such traffic. Accordingly the Commission should defer to the "exclusive jurisdiction" (as contended by the ALTS, including MCI and WorldCom) of the FCC over the interpretation of its exemption and wait until the FCC issues its order in the ALTS Docket.

B. Staff and Complainant Arguments Are Wrong with Respect to Call Termination.

Staff and the Complainants variously argue that ISP traffic is not considered by the FCC to be exchange access traffic; that ISPs are, therefore, end users and not carriers; and that calls to the Internet, therefore, actually consist of two calls -- one call that terminates at the ISP (a local call for which reciprocal compensation must be paid) and one call from the ISP that terminates on the Internet. (Staff Int. Br. pp. 9-10, TCG Int. Br. pp. 10-15; WorldCom Int. Br. p. 8, MCI Int. Br., p. 13).

If the Commission rejects the position that it should defer to the FCC's jurisdiction and await the FCC's decision in the ALTS Docket, the Commission should nonetheless reject these arguments. First, with respect to the position that ISP traffic is not exchange access traffic, TCG, in particular, cites various definitions in the federal Act and argues that Internet ISP traffic cannot possibly be "exchange access" traffic. (TCG Int. Br., p. 16, fn. 9-11). TCG's position defies regulatory history. As summarized in Ameritech Illinois' Initial Brief and in Mr. Panfil's testimony, the FCC exemption of ISP traffic from carrier access charges rests on the premise that such traffic is exchange access traffic; therefore an exemption is needed to avoid the application of such charges. (Am. Ill. Int. Br., pp. 5-8; Am. Ill. Ex. 1.0, pp. 5-14). Furthermore, the FCC has seriously considered lifting the exemption (in 1988) and is considering the scope of the exemption in the context of reciprocal compensation (in the ALTS Docket). This regulatory history

III. CONCLUSION

For the reasons set forth above and in its Initial Brief, Ameritech Illinois respectfully requests that the Commission defer ruling until the FCC issues its decision in the ALTS Docket. If the Commission decides it has the authority to issue a decision before the FCC ruling, Ameritech Illinois respectfully requests that the Commission deny relief sought by the Complainants and otherwise issue an order consistent with Ameritech Illinois, Initial and Reply Briefs.

Respectfully submitted,

By: 

LINCOLN V. JANUS
LOUISE A. SUNDERLAND
Attorney for Illinois Bell Telephone Company
225 West Randolph Street - HQ 27C
Chicago, Illinois 60606
(312) 727-7566

COPY

STATE OF ILLINOIS ILLINOIS COMMERCE COMMISSION

Teleport Communications Group Inc.)	
vs.)	
Illinois Bell Telephone Company, d/b/a	)	No. 97-0404
Ameritech Illinois)	
)	
Complaint as to dispute over a contract definition)	
<hr/>		
WorldCom Technologies, Inc., successor in)	
interest to MFS Intelenet of Illinois, Inc.)	
vs.	)	No. 97-0519
Illinois Bell Telephone Company, d/b/a)	
Ameritech Illinois)	
)	
Complaint as to Respondent's failure to pay)	
Complainant reciprocal compensation for local)	
calls which originate on Respondent's network)	
and terminate on Complainant's network.)	
<hr/>		
MCI Telecommunications Corporation and)	
MCIMetro Access Transmission Services, Inc.)	
vs.	)	No. 97-0525
Illinois Bell Telephone Company, d/b/a)	
Ameritech Illinois)	
	)	(consolidated)
Complaint as to Respondent's refusal to pay)	
reciprocal compensation to Complainant for local)	
traffic terminated by Complainant to its Internet)	
service provider customers.)	
<hr/>		

ILLINOIS
 COMMERCE
 COMMISSION
 APR 1 12 51 PM '98
 CHIEF CLERK'S OFFICE

APPLICATION FOR REHEARING OF ILLINOIS BELL TELEPHONE COMPANY

Illinois Bell Telephone Company ("Ameritech Illinois" or "the Company"), by its attorneys, respectfully submits this application for rehearing of the Commission's March 11, 1998 Order in this matter ("Order"). The Order directs Ameritech Illinois to pay reciprocal

II. The Commission's Classification Of The Internet ISP Calls As "Local Traffic" Is Contrary To FCC Rulings And Hence Erroneous As A Matter Of Law.

In addition to misinterpreting the language of the Agreements, the Order also disregards controlling orders by the FCC. When the Commission ruled that the Internet ISP Calls were local traffic, it was not writing on a clean slate. It was not writing on its own slate at all, but on one belonging to the FCC.

As a matter of law, the term "Switched Exchange Access Services," among other terms in the Agreements, is a term of art that incorporates applicable federal statutory definitions and the FCC's rulings as to the types of traffic that constitute "exchange access."^{2/} Well before the Commission accepted jurisdiction over these Complaints, the FCC had already considered the jurisdictional nature of the Internet ISP Calls — in fact, it did so several times over the past 15 years. Each time, the FCC determined that such calls were not "local" calls, as the Order declares, but rather "exchange access" calls, which do not qualify for the reciprocal compensation the Order requires. Each of the FCC's rulings — and, indeed, the very fact that the FCC asserted jurisdiction at all — properly recognizes the reality that the Internet ISP Calls do not originate and terminate within a local service area, but instead provide customers with "access" to out-of-state, even out-of-country, destinations.

The FCC rulings trace back to the adoption of the interstate access charge regime in 1983. At that time, the FCC recognized the need for a uniform structure for access charges "covering those services that make identical or similar use of access facilities," including the

^{2/} See, e.g., Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 660 (1923) ("[l]aws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms"); RTC v. Diamond, 45 F.3d 665, 673 (2d Cir. 1995) ("A contract that is subject to statutory regulation is a contract still. When parties enter into a contract, they are presumed to accept all the rights and obligations imposed on their relationship by state (or federal) law").

information services provided by ISPs. MTS and WATS Market Structure, 93 F.C.C.2d 241, 250 (1993). On reconsideration, however, the FCC carved out temporary exemptions for resellers and for ISPs. The ISP exemption was not based on a determination that such traffic was local traffic, but rather on policy reasons that expressly recognized that such traffic is exchange access traffic. Due to the high costs of exchange access at the time, and the FCC's desire to protect the fledgling information services industry from rate shock, the FCC held that ISP access traffic would be temporarily subject to local exchange rates. MTS and WATS Market Structure, 97 F.C.C.2d 682, 715 (1983).

On appeal, the U.S. Court of Appeals for the D.C. Circuit likewise recognized that ISPs used exchange access facilities, and that, due to the FCC exemption, "[the access charges paid by . . . [ISPs] may thus not fully reflect their relative use of exchange access." National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1136 (D.C. Cir. 1984) ("NARUC"). The court upheld the FCC's temporary exemption, however, explaining that a "graduated transition" to uniform access charges was not unreasonable given the Commission's professed desire "to preserve [the ISPs'] financial viability, and hence avoid adverse customer impacts." Id. at 1136-37.

The FCC removed the temporary exemption for interexchange service resellers in 1986. WATS-Related and Other Amendments of Part 69 of the Commission's Rules, No. 86-1, 1986 FCC LEXIS 3812 (Mar. 21, 1986); WATS-Related and Other Amendments of Part 69 of the Commission's Rules, No. 86-1, 1986 FCC LEXIS 2788 (Aug. 26, 1986). A year later, it proposed to eliminate the exemption for ISPs as well. In so doing, the FCC once again recognized that ISPs used exchange access facilities to provide interstate services, and expressed

its concern "that the charges currently paid by enhanced service providers do not contribute sufficiently to the costs of the exchange access facilities they use." Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking, 2 F.C.C. Rcd. 4305, 4306 (1987) (emphasis added).

As the FCC explained, ISPs, "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services. To the extent that they are exempt from access charges, the other users of exchange access pay a disproportionate share of the costs of the local exchange that access charges are designed to cover." Ibid. The FCC further observed that ISPs "have had ample notice of our ultimate intent to apply interstate access charges to their operations and ample opportunity to adjust their planning accordingly." Ibid. (emphasis added). Due to intense lobbying by the information service industry, however, the FCC ultimately left the ISP exemption in place. See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 3 F.C.C. Rcd. 2631, 2633 (1988). The agency emphasized again, however, that it did not intend the exemption to be permanent. Id. at 2631-33.

The FCC reached the same result in 1991, when it again declined to eliminate the ISP exemption, on the ground that "the enhanced services industry continues to be confronted with a variety of regulatory changes." Amendments to Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 F.C.C. Rcd. 4524, 4535 n.110 (1991). And in its recent Access Reform Order, the FCC again acknowledged that "although information service providers may use incumbent [local exchange carrier] facilities to originate and terminate calls, ISPs [do not] pay interstate access charges." In re Access Charge Reform, First Report and Order, FCC 97-158, CC Docket Nos. 96-262 et al., ¶ 341 (May 16,

1997). Nevertheless, the FCC declined to change the ISP exemption. Id. ¶¶ 344-48. The FCC instituted a new comment proceeding, however, to address the implications of information services at a broader level, with the intention of developing proposals the FCC hopes will be "sensitive to the complex economic, technical and legal questions raised in this area." Usage of the Public Switched Network by Information Service and Internet Access Providers, Notice of Inquiry, CC Docket No. 96-763 FCC 96-488 (rel. Dec. 24, 1996).

The necessary predicate to all of these rulings, and to the temporary exemption for ISPs they created and carried forward, was the FCC's recognition that Internet ISP Calls are exchange access traffic. Had Internet ISP Calls been local calls, the FCC would not have had any reason to create an exemption, and indeed would not even have had jurisdiction to do so. Nor would it have had any basis for repeatedly reconsidering that exemption, or for stating its "ultimate intent" that the exemption be temporary and that interstate exchange access charges eventually apply to ISPs. Even competing local exchange carriers and ISPs recognize that the FCC's rulings mean that Internet ISP Calls are exchange access traffic. See FCC Docket CCB/CBD 97-30, Joint Commenters' Comments, at 12:

From the beginning the [ISP] 'exemption' has been premised on the assumption that the traffic sent between end users and [ISPs] is jurisdictionally interstate. If the traffic were not interstate, there would have been no need for an "exemption" in the first place, because interstate access charges could not lawfully have been applied.

The FCC's determination that Internet ISP Calls are not local traffic but exchange access traffic is dispositive. The Supremacy Clause of the Constitution states "the Laws of the United States . . . shall be the Supreme Law of the Land." "The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in

accordance with statutory authorization." City of New York v. FCC, 486 U.S. 57, 63 (1988) (FCC regulations preempt conflicting state and local regulations). And, as a matter of law, federal statutes and federal regulations adopted in accordance with statutory authorization are incorporated into the Agreements as though they were expressly written therein. See note 5, supra. The Order's conclusion that the Internet ISP Calls are local calls — in the face of several FCC orders to the contrary — cannot stand.

III. By Attempting To Classify Interstate Traffic As "Local," The Order Violates The Principle Of Jurisdictional Separation.

The Communications Act of 1934 creates two "distinct spheres of regulation."

Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 (1986). It reserves to the States exclusive jurisdiction over intrastate communications, and it assigns to the FCC authority over, and responsibility for, interstate communications. The "Louisiana built fence" between these two spheres of regulation has been described by the Eighth Circuit as "hog tight, horse high, and bull strong." Iowa Utilities Board, 120 F.3d at 800.

The Order would cut a gaping hole in the Louisiana-built fence between the interstate and intrastate fields. The separation of interstate and intrastate operations, which is "essential to the appropriate recognition of the competent governmental authority in each field of regulation" (Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 148 (1930)), would be meaningless if state commissions could simply relabel interstate traffic as local. The Internet ISP Calls are not local traffic, nor are they intrastate traffic. Instead, the FCC has repeatedly found that they are interstate exchange access traffic, and its orders are controlling. The Order violates federal law, and the principle of jurisdictional separation, by requiring Ameritech Illinois to pay reciprocal compensation with respect to interstate traffic.

IV. The Order Violates Section 251(g) of the 1996 Act.

Section 251(g) of the Telecommunications Act of 1996 provides in pertinent part:

(g) **CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS.**—On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission. (Emphasis added.)

Under § 251(g), each LEC must, as of today, provide exchange access, information access, and exchange services for such access to ISPs in accordance with the same restrictions and obligations, including receipt of compensation, that applied to that LEC on February 7, 1996 — the date immediately preceding the date of enactment of the 1996 Act.^{2/} As of February 7, 1996, no court order, consent decree, or regulation, order, or policy of the FCC provided for the payment of reciprocal compensation in connection with the provision of the enumerated services. Therefore, reciprocal compensation does not now apply to the provision of the enumerated services, which means that reciprocal compensation does not now apply to the provision of exchange access, information access, or exchange services for such access to ISPs.

^{2/} The last clause of the first sentence of § 251(g) does not apply because none of the referenced restrictions or obligations has been explicitly superseded by any regulation prescribed by the Commission after the date of enactment of the Act.

Reciprocal compensation would apply in the future if and only if the FCC were to explicitly so require by regulation prescribed after the enactment of the 1996 Act. Because the FCC has not done so, § 251(g) precludes imposition of reciprocal compensation charges for the Internet ISP Calls.

CONCLUSION

For the foregoing reasons, the Order violates federal and state law, exceeds the Commission's jurisdiction, is arbitrary and capricious, and is not supported by substantial evidence. Accordingly, the Commission should grant Ameritech Illinois' Application for Rehearing and revise its Order in conformance with this Application.

March 31, 1998

Respectfully submitted,

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**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Teleport Communications Group Inc.)	
vs.)	
Illinois Bell Telephone Company, d/b/a	)	No. 97-0404
Ameritech Illinois)	
)	
Complaint as to dispute over a contract definition)	
<hr/>		
WorldCom Technologies, Inc., successor in)	
interest to MFS Intelnet of Illinois, Inc.)	
vs.	)	No. 97-0519
Illinois Bell Telephone Company, d/b/a)	
Ameritech Illinois)	
)	
Complaint as to Respondent's failure to pay)	
Complainant reciprocal compensation for local)	
calls which originate on Respondent's network)	
and terminate on Complainant's network.)	
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MCI Telecommunications Corporation and)	
MCI Metro Access Transmission Services, Inc.)	
vs.	)	No. 97-0525
Illinois Bell Telephone Company, d/b/a)	
Ameritech Illinois)	
	)	(consolidated)
Complaint as to Respondent's refusal to pay)	
reciprocal compensation to Complainant for local)	
traffic terminated by Complainant to its Internet)	
service provider customers.)	
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**VERIFIED MOTION FOR STAY PENDING REHEARING AND APPEAL
OF ILLINOIS BELL TELEPHONE COMPANY**

Illinois Bell Telephone Company ("Ameritech Illinois" or "the Company"), by its attorneys, respectfully moves the Commission to stay, pending rehearing and appeal, the March

those Agreements. Its ruling is erroneous as a matter of law, and a stay is warranted pending rehearing and judicial review.

The Order ignores Ameritech Illinois' interconnection agreements in yet another respect because it requires Ameritech Illinois to pay any past due amounts within five working days of the issuance of the Order. That time frame runs contrary to many of Ameritech Illinois' approved interconnection agreements. For example, Section 28.1.2 of the MCI/Ameritech Illinois agreement specifically provides that if either party is found to have wrongfully withheld payments owed under the agreement, the party shall make those payments by "the second Bill Due Date after resolution of the Dispute." Accordingly, the Order improperly purports to override that provision, which the Commission approved under Section 252(e)(2) of the Act, and is unlawful for that reason as well.

2. The Commission's Classification Of The Internet ISP Calls As "Local Traffic" Is Contrary To FCC Rulings.

In addition to misinterpreting the language of the Agreements, the Order also disregards controlling orders by the FCC. When the Commission ruled that the Internet ISP Calls were local traffic, it was not writing on a clean slate. It was not writing on its own slate at all, but on one belonging to the FCC.

As a matter of law, the term "Switched Exchange Access Services," among other terms in the Agreements, is a term of art that incorporates applicable federal statutory definitions and the FCC's rulings as to the types of traffic that constitute "exchange access."^{2/} Well before the

^{2/} See, e.g., Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 660 (1923) ("[l]aws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms"); RTC v. Diamond, 45 F.3d 665, 673 (2d Cir. 1995) ("A contract that is subject to statutory regulation is a contract null. When parties enter into a contract, they are

(continued...)

Commission accepted jurisdiction over these Complaints, the FCC had already considered the jurisdictional nature of the Internet ISP Calls — in fact, it did so several times over the past 15 years. Each time, the FCC determined that such calls were not “local” calls, as the Order declares, but rather “exchange access” calls, which do not qualify for the reciprocal compensation the Order requires. Each of the FCC’s rulings — and, indeed, the very fact that the FCC asserted jurisdiction at all — properly recognize the reality that the Internet ISP Calls do not originate and terminate within a local service area, but instead provide customers with “access” to out-of-state, even out-of-country, destinations.

The FCC rulings trace back to the adoption of the interstate access charge regime in 1983. At that time, the FCC recognized the need for a uniform structure for access charges “covering those services that make identical or similar use of access facilities,” including the information services provided by ISPs. MTS and WATS Market Structure, 93 F.C.C.2d 241, 250 (1993). On reconsideration, however, the FCC carved out temporary exemptions for resellers and for ISPs. The ISP exemption was not based on a determination that such traffic was local traffic, but rather on policy reasons that expressly recognized that such traffic is exchange access traffic. Due to the high costs of exchange access at the time, and the FCC’s desire to protect the fledgling information services industry from rate shock, the FCC held that ISP access traffic would be temporarily subject to local exchange rates. MTS and WATS Market Structure, 97 F.C.C.2d 682, 715 (1983).

²(...continued)

presumed to accept all the rights and obligations imposed on their relationship by state (or federal) law”).